

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL TANORIS MADDOX a/k/a DANIEL
TARNOIS MADDOX,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

No. 316659
Bay Circuit Court
LC No. 10-011011-FH

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant pleaded no contest to several offenses, including narcotics offenses, in Bay County on July 26, 2011. He was sentenced to 365 days in jail with credit for 284 days served, and three years' probation. Defendant was released from jail on September 26, 2011, and was arrested in Midland County shortly thereafter on narcotics charges. Following a probation violation hearing in Bay County on February 5, 2013 and February 15, 2013, the trial court determined that defendant violated terms of his probation. The trial court revoked probation and sentenced defendant for the charges underlying his July 26, 2011, guilty plea. The court sentenced defendant as an habitual offender, third offense, MCL 769.11, to prison terms of 50 months to 120 months for furnishing contraband to prisoners, MCL 801.263(1), 24 to 48 months for resisting or obstructing a police officer, MCL 750.81d(1), 93 days for allowing a person with a suspended license to operate a motor vehicle, MCL 257.904(3)(a), and 50 months to 96 months for possession of a controlled substance (crack cocaine) less than 25 grams, MCL 333.7403(2)(a)(v). On June 10, 2013, this Court granted defendant's delayed application for leave to appeal. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

On July 26, 2011, defendant pleaded no contest to several offenses. Defendant was sentenced to 365 days in jail with credit for 284 days served and a three-year term of probation. Defendant was released from jail on September 26, 2011. On March 16, 2012, defendant was arrested in Midland County for allegedly selling narcotics and he was lodged in the Midland County Jail.

On May 23, 2012,¹ the Bay County Prosecutor filed a motion and affidavit for probation revocation proceedings, alleging that defendant violated terms of his probation when he sold the narcotics in Midland County. A bench warrant was issued for defendant's arrest the same day.

On January 23, 2013, defendant was transferred from Midland County to Bay County, whereupon he learned of the probation violation petition for the first time. Defendant asked to postpone a probation violation hearing pending resolution of his charges in Midland County.

The trial court held a probation violation hearing on February 5, 2013, and February 15, 2013. A detective from Midland County testified at the hearing that defendant was involved in a controlled purchase of narcotics in which marked buy money was found on defendant's person. In addition, the detective testified that defendant voluntarily turned over narcotics that he had concealed on his person and a lab report concerning the narcotics was introduced into evidence. The prosecutor ultimately dropped five counts from the probation violation petition, leaving only three counts involving the drugs defendant voluntarily turned over to police.

The trial court found that defendant violated probation. The court revoked probation and resentenced defendant for the offenses underlying defendant's July 26, 2011, guilty plea as set forth above. In sentencing defendant, the trial court stated, "the fact that you seem to thumb your nose at probation and will not respond and stop selling drugs, that's substantial and compelling reasons, in my judgment, to exceed the guidelines."

II. ANALYSIS

Defendant argues that the prosecutor waived the probation violation petition because the prosecutor did not exercise due diligence in serving or executing the warrant where the warrants were issued in May and June 2012, and defendant did not learn of them until January 2013 when he was transferred from Midland County to Bay County.

We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Three requirements must be met under the plain error rule: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763.

When a warrant is issued for a probation violation, it "must be executed with due diligence and . . . failure on the part of the authorities to proceed with due diligence results in a waiver of the violation." *People v Miller*, 77 Mich App 381, 384; 258 NW2d 235 (1977). To determine whether due diligence was exercised, we consider the following four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *People v Collins*, 388 Mich 680, 687-688; 202 NW2d 769 (1972) (citations omitted). Where the delay is less than 18 months, defendant bears the burden of showing prejudice. See *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

¹ On June 4, 2012, the prosecutor filed a supplemental motion and affidavit alleging six additional violations for a total of eight claims of violations.

In this case, even if we were to attribute the time defendant was incarcerated in Midland County to the prosecution, at most, the delay in this case was just over eight months. The first bench warrant was issued on May 23, 2012, and a hearing was held on February 5, 2013. Defendant cannot show that he was prejudiced by the delay. Defendant has not indicated that witnesses would have testified on his behalf had the proceedings occurred earlier and he does not allege any issues with respect to loss of memory or issues involving lost evidence. Indeed, in his brief on appeal defendant admits that he was not prejudiced when he states, “[defendant] may not have been substantially prejudiced by the delay . . . but he was certainly in no way responsible for the delay.” Moreover, in January 2013, after defendant learned of the probation violation petition, he asked that the hearing be delayed pending his charges in Midland County. Additionally, the prosecutor had reason for the delay where defendant was incarcerated from the time the first bench warrant was issued in May 2012 until he was transferred to Bay County in January 2013. In sum, defendant has failed to show that the prosecutor did not act with due diligence in executing the warrant and he is not entitled to relief. *Collins*, 388 Mich at 687-688; *Carines*, 460 Mich at 763-764.

Defendant next argues that the upward departure in sentencing was not supported by substantial and compelling reasons and was disproportionate.

In *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), the Court articulated the applicable standard of review:

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [*Id.* at 300.]

“Under the statutory sentencing guidelines, a departure [from the statutory sentencing range] is only allowed . . . if there is a ‘substantial and compelling reason’ for doing so.” *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003) (citations omitted). “[O]nly those factors that are objective and verifiable may be used to judge whether substantial and compelling reasons exist . . . [and] the reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab [the court’s] attention, and [should be] of considerable worth in deciding the length of a sentence.” *Id.* at 257 (quotations and citations omitted). “Lastly . . . the Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.” *Id.* (quotations and citations omitted).

In this case, defendant’s recommended sentencing range was calculated at 5 to 25 months. See MCL 769.34(4)(c). The trial court departed from this range by 45 months. In doing so, the trial court stated that defendant “basically thumbed [his] nose at the Court and at the probation system.” The court essentially considered defendant’s failure to abide by the terms of his probation and his failure to stop engaging in the sale of narcotics. This Court has previously explained that conduct underlying a probation violation and the violation itself can constitute a substantial and compelling reason to support an upward departure:

[C]onduct underlying a probation violation may serve as a substantial and compelling basis for departure. Putting conduct aside, any probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Because the probation violation is objective and verifiable, the trial court in its discretion may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines. [*People v Schaafsma*, 267 Mich App 184, 185-186; 704 NW2d 115 (2005) (citations omitted).]

Although defendant contested the probation violation charges and succeeded in getting several of them dismissed, the trial court did not clearly err in finding that a probation violation occurred. The court heard testimony from an officer involved in the controlled buy who witnessed defendant voluntarily turn over the controlled substance to a fellow officer. The remaining probation violation charges were for possession, which was established by the uncontroverted testimony of the officer and the supporting lab report.

Nor did the trial court abuse its discretion in finding the probation violation and its underlying conduct were substantial and compelling reasons to depart from the guidelines. *Smith*, 482 Mich at 300. When a trial court departs from the guidelines, it must "ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range." *Babcock*, 469 Mich at 264. Proportionality may consider criminal history. *Id.* A sentencing court "must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history. . . ." *Id.*

In this case, defendant had previously been on parole or probation, yet he failed to demonstrate gain from those alternative sentences and the probation violation report indicated that defendant failed to complete court-ordered services. Defendant returned to selling drugs only a few months after he was released from jail. His conduct showed that he disregarded the terms of probation and refused to comply with the law by returning to the very same illegal conduct for which he had just been granted probation. Such a repeated history of violation provided objective and verifiable reasons that supported the court's characterization of defendant's behavior as "thumb[ing] your nose" at the court and probation. The trial court did not abuse its discretion in finding that defendant's continued involvement in drug dealing and his disregard for the court's probation order amounted to substantial and compelling reasons to support an upward departure. *Smith*, 482 Mich at 300.

In addition to articulating substantial and compelling reasons for the upward departure, the trial court's sentence was proportional in light of defendant's conduct and prior criminal history. *Id.* at 305. Defendant failed to abide by the terms of his probation, violating probation within a few months after he was released from jail. Furthermore, defendant failed to complete court-ordered substance abuse treatment and he continued to engage in significant drug dealing.

At the time of his arrest, defendant had cocaine, heroin, crack cocaine, marijuana and another drug in his possession. Defendant had a significant prior record variable (PRV) score, indicating a substantial criminal history. On this record, the trial court's upward departure was not only supported by substantial and compelling reasons, but it was also proportionate. Defendant is not entitled to resentencing.

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello